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#09-615 (WPCB) (CFO Rulemaking)

Janet Pittman

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Indiana Department of Environmental Management

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DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT
OFFICE OF LAND QUALITY

Dear Ms. Pittman:

The Indiana Department of Environmental Management has posted a second notice of public comment period on amendments to rules concerning confined feeding operations (CFOs), ISA Document #09-615, in the Indiana Register on August 11, 2010. The environmental organizations listed below offer the following comments pursuant to this second notice.

These comments represent opinions and interests of the following organizations ("Groups"):

- The Hoosier Environmental Council is a not-for-profit environmental organization which aims to address Indiana's environmental challenges through education and advocacy. The HEC is guided by science, inspired by the ties between nature and humanity, and led to success through partnerships.
- The Sierra Club is an international not-for-profit membership organization, headquartered in San Francisco, California, with more than 1.3 million members and supporters. Sierra Club's mission includes practicing and promoting the responsible use of earth's ecosystems and resources, and protecting and restoring the quality of the natural and human environment.
- The Conservation Law Center is a not-for-profit public interest law firm located in Bloomington, Indiana, and operates the Conservation Law Clinic under an agreement with Indiana University Maurer School of Law. The Center represents non-profit environmental organizations and governmental entities in conservation matters.
- Citizens Action Coalition of Indiana is a not-for-profit organization with about 40,000 members. The organization's mission is to initiate, facilitate and coordinate citizen action directed to improving the quality of life of all inhabitants of the State of Indiana through principled advocacy of public policies to preserve democracy, conserve natural resources, protect the environment, and provide affordable access to essential human services.

Members of these organizations, or members of the organizations they represent, live, work, and recreate near or on waters of the state that are or will be affected by CFOs and/or CAFOs that contribute pollutants to these waters and that apply CFO and/or CAFO

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products to lands subject to runoff flows into these waters. These individuals will be directly affected by Indiana's amendments to rules concerning CFOs and CAFOs.

Comments

I. AFO Discharges, Accidental or Intentional

Groups agree with the position taken in the Indiana Code (§ 13-11-2-40) and the draft CFO rule that unpermitted AFOs that discharge pollutants from a point source to waters of the State must subsequently seek approval under the CFO rule.

IDEM should highlight this provision in its response to the second-notice comments. In IDEM's summary of specific comments from the first notice of comment period under the category "AFO Accidental Discharges," commenters apparently tried to address the issue of AFO discharge but, in view of IDEM's responses, were unsuccessful in their attempt. Under Ind. Code § 13-11-2-40(3) and the draft rule section 327 IAC 19-2-5, an AFO "that causes a violation of water pollution control laws" is defined as a CFO, and thus must obtain CFO program approval. Any unpermitted AFO that discharges pollutants from a point source to waters of the State would violate Clean Water Act § 1311(a) and 327 IAC 5-2-2 ("Any discharge of pollutants into waters of the state as a point source discharge, except for exclusions made in 327 IAC 5-2-4, is prohibited unless in conformity with a valid NPDES permit obtained prior to the discharge."). Such a discharge from an AFO is a violation of law, irrespective of whether the discharge is accidental or intentional, and irrespective of whether IDEM initiates an enforcement action. All that is required is a finding by IDEM that such a discharge has occurred and one or more AFOs are responsible for the discharge. Such a finding may be supported by data gathered by IDEM or by third parties. *See* 40 CFR §§ 25.9 and 123.26 (requiring IDEM to have internal procedures for

receiving and investigating evidence submitted by citizens about program and permit violations).

II. Reporting Requirements, Public Notification, and Public Participation

1. The existing CFO rule requires that IDEM notify the public of submittal of an application for program approval. See 327 IAC 16-7-13 (b) ("Upon receipt of an application package, the department shall provide notice of receipt of the application to: (1) the owner/operator; (2) the public through notice in a newspaper; and (3) local officials in accordance with IC 13-15-3-1."). The draft CFO rule does not require notice to the public of application submittal. Provision of a public comment period is meaningless without such notification. Thus, draft rule section 327 IAC 19-8-7 is inadequate because it does not require public notification of the submittal of a CFO application.

2. Groups commented during the first-notice period that "the operator should report and certify land applications of CFO and CAFO manure and this information should be made available to the public," and that all records, including NMPs, manure management plans, reports of waste management practices, locations, nutrient balance, crop rotations, etc. should be made available to the public. IDEM stated in response that the "land application records are kept in the operating record on-site for inspection by IDEM staff." This response is inadequate and does not address the issue of availability of this information to the public. IDEM's response confuses making information available to IDEM with making information available to the public so that the public may understand events, such as the

land application of manure within their communities, in which they have a substantial interest.

The policy and objectives for public participation in Clean Water Act programs should be applied to the CFO rule as well as the CAFO NPDES rule. *See* 40 CFR §§ 25.3 and 25.4. Under federal regulations, IDEM is to “encourage public involvement in implementing environmental laws” and to “use all feasible means to create opportunities for public participation.” 40 CFR § 25.3. Providing information to the public about manure management and land applications of manure is a necessary prerequisite to meaningful, active public involvement. The public cannot meaningfully participate in the development and modification of manure management plans and nutrient management plans without information on land applications by specific facilities. Nor can the public meaningfully fulfill their rights and obligations under the Clean Water Act’s citizen suit provision or contribute information about program and permit violations (*see* 40 CFR § 123.26(b)(3) and (4)) without such information. Although the above-cited requirements for public participation specifically apply to the NPDES program, there is no justification for having a separate set of public participation requirements for the CAFO NPDES rule and the CFO rule.

3. The CFO rule should have a reports and reporting section, similar to the rule for the land application of biosolid, industrial waste product, and pollutant-bearing water at 327 IAC 6.1. Section 6.1-4-18(a) of that rule requires monthly reports to IDEM of “activities and analyses related to the disposal of a biosolid or industrial waste product.” Section 6.1-7-12(a) requires similar reporting for the land application of pollutant-bearing water. Even people who apply pollutant-bearing water in quantities too small to be regulated by that section of

the rule must submit written notification to IDEM at least 30 days before initial land application and annually at the start of the year thereafter (327 IAC 6.1-7.5-1). Moreover, these records and notifications are available to the public.

Similarly, the public should be able to be informed about the land application of manure. While monthly reporting by CFO operators might be considered onerous, it would not be too burdensome to require reports twice each year. The first report, submitted by January 31, should describe the locations, with maps, of each site where manure will be applied during the coming year. If the operator adds a new site during the year, he or she must report that location to IDEM before manure is applied. By December 31, the operator should report where, when, and how much manure was applied on each of these sites.

Having access to this information would allow members of the public who take water samples, such as participants in the Hoosier Riverwatch program, to determine whether there are any significant changes in *E. coli* or nutrient levels associated with manure applications, especially in relation to precipitation. Watershed groups and other people interested in improving water quality would need this information to properly assess pollutant loadings and develop a watershed management plan.

4. With regard to draft 327 IAC 19-8-7 (Notice to Adjacent Landowners), public notice should be published and appropriate signage should be displayed on the land prior to construction. Notice should also be sent to all adjacent landowners and occupants. Public comments should be allowed from anyone in the community. Because diseases such as influenza have the potential to travel up to 15-20 km, all landowners and residents within that radius should be allowed to participate.

III. Manure Management and Storage, Manure Application, Manure Management Plans

1. The contents of the manure management plan required in draft CFO rule section 327 IAC 19-7-5 mainly addresses testing of soil and manure. The draft rule section omits several requirements, however, included in the federal regulations on nutrient management plans (NMPs) under the NPDES program. *See* 40 CFR § 122.42. The following important federal requirements for NMPs should be included in the manure management plan requirements under the CFO rule.

- best management practices necessary to meet the requirements of the rule;
- identification of appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the State;
- protocols to land apply manure, litter or process wastewater in accordance with site specific management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater;
- identification of specific records that will be maintained to document the implementation and management of the minimum elements of the plan;
- estimated amount of total manure, litter and process wastewater generated by the CFO in the previous 12 months (tons/gallons);
- total number of acres under control of the CFO that were used for land application of manure, litter and process wastewater in the previous 12 months;
- amount of total manure, litter and process wastewater transferred to another person by the CFO in the previous 12 months (tons/gallons);
- actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, and the amount of manure, litter, and process wastewater applied to each field during the previous 12 months;
- summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume.

2. With regard to draft Rule 13 (Manure Handling and Storage; Site, Design, and Construction Requirements), Rule 13 addresses design requirements only for new manure

storage structures. However, if new standards are required to meet the regulations set forth by the Clean Water Act, all manure storage facilities should be required to adhere to the specified leakage rates and design standards. Existing manure storage facilities should submit to testing to determine whether they are in compliance with the new design standards. If the facilities are not in compliance, they should submit a plan to upgrade and/or relocate existing manure storage structures with manure management plan. The timeline for implementation of new requirements should not exceed the existing permit. Inspection of new or upgraded facilities should be required for permit renewal. Engineers that verify construction designs and implementation should be required to be licensed in Indiana.

3. With regard to draft 327 IAC 19-4-3 (Manure Application Rates), this section of the manure application rule states that it applies only to the owner/operator of a new confined feeding operation. But do existing owners have soil tests and manure tests on file with IDEM? This section of the rule should be revised to say as follows: "The owner/operator of a confined feeding operation shall have a soil test and a manure test conducted in accordance with the manure management plan submitted to meet the requirement in 327 IAC 16-7-2(b)(6)." Furthermore, there is no mention of pathogenic contamination. Testing of manure must include more than nutrient content; due to documented crop contamination, testing for pathogens must be required before manure can be distributed as a fertilizer material in order to protect food, farmers, and nearby rural residents. The list of information required for the operating record should include the following: "(9) Content of

pathogens, including *E. coli*, *Listeria*, *Salmonella*, and a treatment plan in the event that pathogens are found in manure.”

4. With regard to draft 327 IAC 19-12-2 (Setbacks) and draft 327 IAC 19-14-6 (Manure Application Setbacks), the setbacks specified in the draft rule are not sufficient to protect public health and the waters of the state. There are many variables that must be addressed in proper manure management plans and nutrient management plans in order to mitigate water pollution and nutrient overloading. Untreated manure can contaminate groundwater, surface water and drinking water wells through multiple pathways: (1) poorly constructed and managed lagoons; (2) major precipitation events, flooding or overflow; (3) improper staging, storage and land application practices; and (4) atmospheric deposition. The extent to which contamination pathways impact water quality is also based on many variables; however, the most important and easily controlled factor is the proximity of the waste disposal system and land application to groundwater, surface water or wells. There is precedent for strong setbacks within the State of Indiana. We would recommend the following minimum setbacks for waste management systems: (1) 327 IAC 19-12-2(b)(1) should be revised to require a minimum setback of one thousand five hundred (1,500) feet from a public water supply well or public water supply surface intake structure; and (2) 327 IAC 19-12-2 (b)(2) should be revised to require a minimum setback of five hundred (500) feet from surface waters of the state, drainage inlets, including water and sediment control basins, sinkholes, as measured from the surficial opening or the lowest point of the feature, and off-site water wells. Furthermore, 327 IAC 19-12-2 should be revised to require a

minimum setback of five hundred (500) feet from the features described in 327 IAC 19-12-2

(b)(2) for manure storage facilities that contain solids.

Thank you for considering our comments.

Sincerely,



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